

(6) The provisions for liaison between the State and the Administrator concerning the administration and enforcement of this part as may be agreed by the Administrator and the State.

(c) If at any time the Administrator shall determine that the State lead agency or other State agencies charged with carrying out the terms of the State-Federal cooperative agreement are unable or unwilling to carry out the terms of the agreement, or, if for any reason the Administrator or State shall determine that the agreement is no longer in effect, the Administrator shall administer and enforce this part in the State.

(d) If a State shall notify the Administrator of its readiness to enter into a State-Federal cooperative agreement prior to passage of State legislation and regulations governing recordkeeping by certified applicators of restricted use pesticides, the Administrator may enter into a State-Federal cooperative agreement with the State on an annual basis.

(e) For a State to be eligible for Federal technical or financial assistance under a State-Federal cooperative agreement, the State requirements for recordkeeping by all certified applicators of restricted use pesticides must be comparable to the recordkeeping requirements under this part.

§ 110.7 Penalties.

Any certified applicator who violates 7 U.S.C. 136i-1 (a), (b), or (c) or this part shall be subject to a civil penalty of not more than \$500 in the case of the first offense, and in the case of subsequent offenses, be subject to a civil penalty of not less than \$1,000 for each violation, except that the civil penalty shall be less than \$1,000 if the Administrator determines that the certified applicator made a good faith effort to comply with 7 U.S.C. 136i-1 (a) (b), and (c) and this part.

[60 FR 8123, Feb. 10, 1995]

§ 110.8 Rules of practice.

(a) *Notice of violation.* If there is reason to believe that a person has violated or is violating any provision of this part, the complainant may file with the Presiding Officer a notice of

violation signed by the complainant. The notice of violation shall state:

- (1) The date of issuance of the notice of violation;
- (2) The nature of the proceeding;
- (3) The identification of the complainant and respondent;
- (4) The legal authority under which the proceeding is instituted;
- (5) The allegations of fact and provisions of law which constitute the basis for the proceeding;
- (6) The amount of the proposed civil penalty; and
- (7) The name, mailing address, and telephone number of the Presiding Officer.

(b) *Answer.* Within 30 days after the service of the notice of violation, the respondent shall file with the Presiding Officer an answer signed by the respondent or by the attorney of record in the proceeding. The answer shall:

- (1) Admit, deny, or explain each of the allegations in the notice of violation and set forth any defense asserted by the respondent; or
- (2) State that the respondent admits all the facts alleged in the notice of violation; or
- (3) State that the respondent admits the jurisdictional allegations in the notice of violation and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within 30 days after service of the notice of violation shall be deemed, for purposes of the proceeding, an admission of the allegations in the notice of violation, and failure to deny or otherwise respond to an allegation in the notice of violation shall be deemed, for purposes of the proceeding, an admission of the allegation, unless the complainant and respondent have agreed to a consent decision pursuant to paragraph (e) of this section.

(d) *Amendment of notice of violation or answer.* At any time prior to the filing of a motion for a hearing, the notice of violation or answer may be amended with the consent of the complainant and respondent or as authorized by the Presiding Officer upon a showing of good cause.

(e) *Consent decision.* At any time before the Presiding Officer files the decision, the complainant and respondent may agree to the entry of a consent decision. The agreement shall be in the form of a decision signed by the complainant and respondent with appropriate space for signature by the Presiding Officer, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure, and such other admissions or statements as may be agreed to by the complainant and respondent. The Presiding Officer shall enter such decision without further procedure, unless an error is apparent on the face of the document. The consent decision shall have the same force and effect as a decision issued after a full hearing, shall become final upon issuance, and shall become effective in accordance with the terms of the decision.

(f) *Procedure upon failure to file an answer or admission of facts.* The failure to file an answer with the Presiding Officer, or the admission by the answer of all the material allegations of fact contained in the notice of violation, shall constitute a waiver of hearing. Upon such admission or failure to submit an answer, complainant shall file with the Presiding Officer a proposed decision, along with a motion for the adoption of the proposed decision both of which shall be served upon the respondent by the Presiding Officer. Within 20 days after service of the motion and proposed decision, the respondent may file with the Presiding Officer objections to the motion and proposed decision. If the Presiding Officer finds that meritorious objections have been filed, complainant's motion shall be denied with supporting reasons. If meritorious objections are not filed, the Presiding Officer shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's motion shall be served by the Presiding Officer upon the respondent and the complainant and may be appealed pursuant to paragraph (l) of this section. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service of the decision upon the re-

spondent, unless there is an appeal to the Administrator by the complainant or respondent, pursuant to paragraph (l) of this section.

(g) *Conferences.* (1) Upon motion of the complainant or respondent, the Presiding Officer may direct the complainant and respondent or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Presiding Officer finds that the proceeding would be expedited by a conference. Reasonable notice of the time and place of the conference shall be given. The Presiding Officer may order the complainant or respondent to furnish at or subsequent to the conference any or all of the following:

- (i) An outline of the case or defense;
- (ii) The legal theories upon which the party will rely;
- (iii) A list of documents which the party anticipates introducing at the hearing; and
- (iv) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

(2) The Presiding Officer shall not order a party to furnish the information or documents listed in paragraph (g)(1) (i) through (iv) of this section if the party can show that providing the particular information or document is inappropriate or unwarranted under the circumstances of the particular case.

(3) At the conference, the following matters may be considered:

- (i) The simplification of issues;
- (ii) The necessity of amendments to the notice of violation or answer;
- (iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;
- (iv) The limitation of the number of expert or other witnesses;
- (v) Negotiation, compromise, or settlement of issues;
- (vi) The exchange of copies of proposed exhibits;

(vii) The identification of documents or matters of which official notice may be requested;

(viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(ix) Such other matters as may expedite and aid in the disposition of the proceeding.

(4) A conference will not be stenographically reported unless so directed by the Presiding Officer.

(5) In the event the Presiding Officer concludes that personal attendance by the Presiding Officer and the parties or counsel at a conference is unwarranted or impractical, but determines that a conference would expedite the proceeding, the Presiding Officer may conduct the conference by telephone or correspondence.

(6) Actions taken as a result of a conference shall be reduced to a written appropriate order, unless the Presiding Officer concludes that a stenographic report shall suffice, or, the Presiding Officer elects to make a statement on the record at the hearing summarizing the actions taken.

(h) *Procedure for hearing.* (1) *Request for hearing.* The complainant or respondent may request a hearing on the facts by including such a request in the notice of violation or answer, or by a separate request, in writing, filed with the Presiding Officer within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of a hearing. In the event the respondent denies any material fact and fails to file a timely request for a hearing, the matter may be set down for hearing on motion of the complainant filed with the Presiding Officer or upon the Presiding Officer's own motion.

(2) *Time and place.* If any material issue of fact is joined by the pleading, the Presiding Officer, upon motion of any of the parties stating that the matter is at issue and is ready for hearing, shall set a time and place for hearing as soon as feasible with due regard for the public interest and the convenience and necessity of the parties. The Presiding Officer shall issue a notice stating the time and place of hearing. If any change in the time or place of

the hearing is made, the Presiding Officer shall issue a notice of this change, which notice shall be served upon the complainant and respondent, unless it is made during the course of an oral hearing and made a part of the transcript, or actual notice is given to the parties.

(3) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any individual who appears as an attorney must conform to the standard of ethical conduct required of practitioners before the courts of the United States.

(4) *Debarment of attorney.* Whenever a Presiding Officer finds that an individual acting as attorney for any party to the proceeding is guilty of unethical or contumacious conduct, in or in connection with a proceeding, the Presiding Officer may order that the individual be precluded from further acting as attorney in the proceeding. An appeal to the Administrator may be taken from any such order, but no proceeding shall be delayed or suspended pending disposition of the appeal: *Provided*, That the Presiding Officer shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

(5) *Failure to appear.* A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. The failure by the respondent to appear at the hearing shall also constitute an admission of all the material allegations of fact contained in the notice of violation. The complainant shall have an election whether to follow the procedure set forth in paragraph (f) of this section or whether to present evidence, in whole or in part, in the form of affidavits, exhibits, or by oral testimony before the Presiding Officer. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Presiding Officer's decision and to appeal to the Administrator pursuant to paragraph (l) of this section.

(6) *Order of proceeding.* Except as may be determined otherwise by the Presiding Officer, the complainant shall proceed first at the hearing.

(7) *Evidence.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

(ii) Upon a finding of good cause, the Presiding Officer may order that any witness be examined separately and apart from all other witnesses except those who are parties to the proceeding.

(iii) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(8) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Presiding Officer, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Presiding Officer.

(ii) Only objections made before the Presiding Officer may subsequently be relied upon in the proceeding.

(9) *Exhibits.* Unless the Presiding Officer finds that the furnishing of copies is impracticable, four copies of each exhibit shall be filed with the Presiding Officer: *Provided*, That, where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(10) *Official records or documents.* An official government record or document or entry in such a record or document, if admissible for any purpose, shall be admissible in evidence without the production of the individual who made or prepared the same, and shall be prima facie evidence of the relevant facts stated in the record or document. Such record or document shall be evidenced by an official publication of the record or document or by a copy certified by an individual having legal authority to make such certification.

(11) *Official notice.* Official notice shall be taken of such matters as are

judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

(12) *Offer of proof.* Whenever evidence is excluded by the Presiding Officer, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, the statement shall be included in the transcript in its entirety. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript and hearing record if the Administrator, upon appeal, decides the Presiding Officer's ruling excluding the evidence was erroneous and prejudicial. If the Administrator, upon appeal, decides the Presiding Officer's ruling excluding the evidence was erroneous and prejudicial and that it would be appropriate to have such evidence considered a part of the hearing record, the Administrator may direct that the hearing be reopened to permit the taking of such evidence or for any purpose in connection with the excluded evidence.

(13) *Transcript.* Hearings shall be recorded and transcribed verbatim.

(i) *Post-hearing procedure—(1) Corrections to transcript.* (i) Within the period of time fixed by the Presiding Officer, any party may file a motion proposing corrections to the transcript.

(ii) Unless a party files a motion proposing corrections to the transcript in the time fixed by the Presiding Officer, the transcript shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record and shall be deemed to be certified without further action by the Presiding Officer.

(iii) As soon as practicable after the close of the hearing and after consideration of any timely objection filed as to the transcript, the Presiding Officer shall issue an order making any corrections to the transcript which the Presiding Officer finds are warranted, which corrections shall be entered on to the original transcript by the Presiding Officer without obscuring the original text.

(2) *Proposed finding of fact, conclusions, order, and briefs.* Prior to the Presiding Officer's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support of the proposed findings of fact, conclusions and order. A copy of each such document filed by a party shall be served upon each of the other parties.

(3) *Presiding Officer's decision.* (i) The Presiding Officer shall issue a decision within 30 days after the hearing, or, if any party submits proposed findings of fact, conclusions, order, and a brief in support thereof in accordance with paragraph (i)(2) of this section, 30 days after the last such submission. The Presiding Officer's decision shall include the Presiding Officer's findings of the fact, conclusions of law, and the reasons or basis for the findings of fact and conclusions of law.

(ii) The Presiding Officer's decision shall become effective without further proceedings 35 days after the date of service of the decision upon the respondent, unless there is an appeal to the Administrator by a party to the proceeding pursuant to paragraph (l) of this section.

(j) *Motions and requests—(1) General.* All motions and requests shall be filed with the Presiding Officer, and served upon all the parties, except:

(i) requests for extensions of time pursuant to paragraph (m)(3) of this section; and

(ii) motions and requests made on the record during the oral hearing. The Presiding Officer shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Presiding Officer's decision pursuant to paragraph (l) of this section except motions directly relating to the appeal. Thereafter, the Administrator will rule

on any motions and requests, as well as the motions directly relating to the appeal.

(2) *Motions entertained.* (i) Any motion will be entertained other than a motion to dismiss on the pleading. (A motion by the complainant seeking the voluntary dismissal of the notice of violation may be entertained by the Presiding Officer or the Administrator.)

(ii) All motions and requests concerning the notice of violation must be made within the time allowed for filing an answer, except motions by the complainant seeking voluntary dismissal of the notice of violation.

(3) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds for the order, ruling, or action desired.

(4) *Response to motions and requests.* Within 10 days after service of any written motion or request, or within a shorter or longer period as may be fixed by the Presiding Officer or the Administrator, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Presiding Officer or the Administrator, in their discretion, may order that a reply be filed.

(k) *Presiding Officer—(1) Assignment.* No Presiding Officer shall be assigned to serve in any proceeding who:

(i) Has any pecuniary interest in any matter or business involved in the proceeding;

(ii) Is related within the third degree by blood or marriage to any party to the proceeding; or

(iii) Has any conflict of interest which might impair the Presiding Officer's objectivity in the proceeding.

(2) *Disqualification of Presiding Officer.*

(i) Any party to the proceeding may, by motion made to the Presiding Officer, request that the Presiding Officer withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Presiding Officer may then either rule upon or certify the motion to the Administrator, but not both.

(ii) A Presiding Officer shall withdraw from any proceeding for any reason deemed by the Presiding Officer to be disqualifying.

(3) *Powers.* The Presiding Officer, in any assigned proceeding, shall have power to:

- (i) Rule upon motions and requests;
- (ii) Set the time and place of a conference and the hearing, adjourn the hearing from time to time, and change the time and place of hearing;
- (iii) Administer oaths and affirmations;
- (iv) Summon and examine witnesses and receive evidence at the hearing;
- (v) Admit or exclude evidence;
- (vi) Hear oral argument on facts or law;
- (vii) Do all acts and take all measures necessary for maintenance or order, including the exclusion of contumacious counsel or other persons; and
- (viii) Take all other actions authorized under this section.

(l) *Appeal to the Administrator—(1) Filing of petition.* Within 30 days after receiving notice of the Presiding Officer's decision, a party who disagrees with the decision, or any part of the Presiding Officer's decision, or any ruling by the Presiding Officer or a party who alleges a deprivation of rights, may appeal the Presiding Officer's decision or rulings to the Administrator by filing an appeal petition with the Administrator. As provided in paragraph (h)(8) of this section, objections regarding evidence or a limitation regarding examination or cross examination or other ruling made before the Presiding Officer may be relied upon in an appeal. The appeal petition shall state the name and address of the person filing the appeal petition. Each issue set forth in the appeal petition, and the arguments on each issue, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations, or authorities being relied upon in support of the argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(2) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in sup-

port of the appeal petition, filed by a party to the proceeding, any other party may file with the Administrator a response in support of or in opposition to the appeal petition and, in such response any relevant issue, not presented in the appeal petition, may be raised.

(3) *Transmittal of record.* Whenever an appeal to the Presiding Officer's decision is filed and a response to the appeal has been filed or time for filing a response has expired, the Presiding Officer shall transmit to the Administrator the record of the proceeding. The record shall include: the pleading; motions and requests filed and rulings on such motions and requests; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection with the hearing; any documents or papers filed in connection with a conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Presiding Officer's decision; and such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding.

(4) *Decision of the Administrator on appeal.* As soon as practicable after the receipt of the record from the Presiding Officer, the Administrator, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Administrator decides that no change or modification of the Presiding Officer's decision is warranted, the Administrator may adopt the Presiding Officer's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

(m) *Filing; service; extensions of time; and computation of time—(1) Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by this section to be filed with the Presiding Officer or Administrator shall be filed in quadruplicate: *Provided,* That where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party.

(2) *Service; proof of service.* Copies of all documents or papers required or authorized by this section to be filed with the Presiding Officer or Administrator shall be served upon the parties by the person with whom such documents or papers are filed. Service shall be made either:

(i) By delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such person; or

(ii) By leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney of record representing such person and mailing by regular mail another copy to such person at such address; or

(iii) By registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney of record representing such person, at the last known residence or principal office or place of business of such person: *Provided*, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail. Proof of service under this paragraph shall be made by the certificate of the person who actually made the service: *Provided*, That if the service be made by mail, under paragraph (m)(2)(iii) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, or by the certificate of the person who mailed the matter by regular mail. Any certificate or post-office receipt returned to the Presiding Officer or Administrator shall be filed by the Presiding Officer or Administrator, and made a part of the record of the proceeding.

(3) *Extensions of time.* The time for the filing of any document or paper required or authorized under this section to be filed may be extended by the Presiding Officer or the Administrator as

provided in paragraph (j) of this section, if in the judgment of the Presiding Officer or the Administrator, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

(4) *Effective date of filing.* Any document or paper required or authorized under this section to be filed shall be deemed to be filed at the time when it reaches the person with whom the document or paper must be filed.

(5) *Computation of time.* Saturdays, Sundays, and holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or holiday, such period shall be extended to include the next following business day.

(n) *Ex parte communications.* (1) At no stage of the proceeding between its institution and the issuance of the final decision shall the Presiding Officer or Administrator discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided*, That the Presiding Officer or Administrator may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of such discussion shall be included in the record.

(2) No interested person shall make or knowingly cause to be made to the Presiding Officer or Administrator an *ex parte* communication relevant to the merits of the proceeding.

(3) If the Presiding Officer of the Administrator receives an *ex parte* communication in violation of this paragraph (n), the individual who receives the communication shall place in the public record of the proceeding:

- (i) Any such written communication;
- (ii) Memoranda stating the substance of such oral communication; and
- (iii) Any written response, and memoranda stating the substance of

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any oral response to the ex parte communication.

(4) For purposes of this section *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or the proceeding.

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§ 110.9 Miscellaneous.

In accordance with Section 3507 of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the recordkeeping provisions in this rule have been approved by the Office of Management and Budget (OMB) and there are no new requirements. The assigned OMB control number is 0581-AA39.

PARTS 111–159 [RESERVED]